require these things be sent at the closing table, then those would be something that may need to be filled in. Every investor, every lender is different."

THE WITNESS: Correct.

"Q And is this a document that you prepared?

"A Yes.

"Q And when did you prepare it?

"A I have no idea.

"Q At the bottom it has a mailed -- "mailed" stamp.

"A Right.

"Q Is that your writing there?

"A It is. My scribbles. It was 12. 12-0 maybe 12-0 or maybe 12-5 and then an '05.

"Q And is this something that you mailed to Brian Kitts?

"A Yeah. It's all -- this all would have been one packet that went out.

"Q Okay. And is it your testimony that the date on this is wrong as well?

"A Yes.

"Q It should have been '04?

"A Yes. Correct. That is my mistake."

Q. (BY MR. AFFLECK) Did I read that correctly?
A. Yes.
Q. Is that your testimony? Would that be your testimony --
A. No.
Q. -- today as well?
A. No. It would not.
Q. And how would you change your testimony today?
A. Because I can't tell you for sure that I don't -- I have no recollection of actually doing these specific disclosures. I am assuming that I did. It was what was in my file. And I have no recollection of actually mailing these. I'm assuming that they were mailed on the dates in which they were stamped acknowledging the fact that there were errors on the dates on the stamp.
Q. Okay. So the testimony at your deposition you would say you remembered incorrectly at your deposition?
A. Can I take a moment to clarify?
Q. Absolutely.
A. Okay. If these were -- if these were file fillers, I can't speak to that. I know that this was in my file when we had given the packet of information to Fabian & Clendenin. Beyond that, I don't have specific recollection of actually being on the computer, doing these documents up, so I am making assumptions that these were documents that I

would have prepared.
Q. So your testimony --
A. And when, as I've indicated in my testimony, I don't know when I had prepared them.
Q. So your testimony that these were your scribbles, that you put the mailed stamp on --
A. I'm assuming so.
Q. -- and that you mailed it to Brian Kitts, is that correct or is that --
A. I'm making --
Q. -- also incorrect?
A. I'm making an assumption.
Q. You're making an assumption?
A. An assumption. I don't have recollection of actually doing that action.
Q. Are you changing your testimony that these are not your scribbles; the 12-5-05 to 12-29-0 --
A. I'm not changing my -- I'm not changing my testimony that those are not.
Q. So those are --
A. I'm -- I'm saying I don't have recollection of doing that.
Q. But testifying today, you look at the numbers that are scribbled in at the bottom, and the mailed stamp, and you have a recollection of doing that, and you recognize

those scribbles as your scribbles?
A. I recognize them as scribbles.
Q. In your deposition --
A. My -- and I'll -- and I'll speak further to that. And after -- after having done my deposition, I realized that we have files within Citywide that everyone has access to, and those files, if certain things are missing from those files, any processor can, in fact, insert documents into those files as a matter of compliance.
If they would have done that, they would not have known that this was a private money loan. They would have seen that I had information on a borrower and had -- and could have, perhaps, put disclosures in for compliance purposes. What I'm saying here is I don't actually recall doing this document.
Q. Have -- have you discussed with anyone the deposition of the Kalix representative in this case?
A. No.
Q. If you would look --
A. I didn't know you had a Kalix representative here.
Q. I don't.
A. Okay.
Q. They -- their testimony was taken by deposition.
A. Okay.
Q. If you will turn to Exhibit 7, Winterfox No. 12.

A. I'm sorry. Could you repeat that. The number.
Q. Winterfox 12.
A. Okay.
Q. You see the mailed stamp at the bottom right-hand corner?
A. I'm sorry. Maybe I have the wrong page. No. 12?
Q. Yes. It should say WF 00012. In Exhibit 7.
A. Okay. I -- oh. I apologize. I went to tab 12.
Q. And these are just the disclosures for the first loan.
A. Okay.
Q. Now, that mailed --
A. I'm there.
Q. The mailed stamp there says 12-5-05. Your testimony would be it was 12-5-04. Correct?
A. I'm testifying that's what the stamp says is 12-5-05, and I believe that the stamp is incorrect.
Q. That it should have been 12-5-04?
A. Um --
Q. That was your testimony, right; that it was just a mistake?
A. Right. Well, obviously. There are -- there are multiple inaccuracies as far as the dates on the mailed-to stamps.
Q. Okay. Now, right in that form, or right where

that mailed stamp is, it says "Kalix Form Privacy 6/05."
A. Uh-huh.
Q. Do you know what that refers to?
A. That was probably -- 6-5-05 was maybe the Kalix Point version that was out when the disclosures -- when these disclosures were done.
Q. And have you -- has that been brought to your attention since you testified in your deposition?
A. No. Looking at it now, I can see that's probably the current -- or the current program that these were done on.
Q. Now if you'll look at Exhibit 8, Winterfox 34. This is the same private policy disclosure that was done in the first loan for the second loan. It has a mailed stamp 12-29-05, and your testimony is that that would be a mistake; it should have been '04. Right?
A. I'm saying that it's incorrect.
Q. Right. That it should have been '04, not '05, when it was mailed?
A. I'm saying it was stamped definitely incorrect.
Q. The stamp is definitely correct?
A. Incorrect.
Q. Oh. Incorrect. And it should have been '04? What is incorrect about the stamp? The '04 date or the --
A. The '05 date?

Q. -- the '05 date?
Yes. It should have been '04?
A. Yes. That's when the loans were done. It should -- it should have been '04. The version here is saying 6 of '05.
Q. No further questions.

CROSS EXAMINATION +

BY MS. BOULEY:

Q. Good morning, Ms. Fields.
A. Good morning.
Q. You -- you testified a little earlier about the origination process of this loan from Winterfox. Did Winterfox seek out Mr. Kitts for the loan?
A. No. We wouldn't -- we wouldn't have known Mr. Kitts.
Q. So would you say, then, that Winterfox did not originate this loan?
A. No. Absolutely not.
Q. And looking at Exhibit 7 and 8 --
A. Are you talking tab 7 and 8?
Q. Yes. Exhibit, right, tab 7 and 8. You were asked about what looked like, perhaps, I think Mr. Affleck suggested a partial zero and a date prepared --
A. Yeah.
Q. -- slot.

Do you know how many copies removed these copies are, Exhibit 7 and 8, from the originals?

A. Many. Many, many, many, many, I'm sure. I -- I can't -- I can't -- I have no idea, obviously, by the time it got through multiple sources, how many -- how many copies could have been produced or faxed, for that matter. And, as you know, when things are copied, there are marks that appear on -- on documents.

Q. All right. And isn't it true as well that sometimes other portions of the document are obscured when they're copied?

A. Absolutely.

Q. But, again, you don't know what that mark is in the "Date Prepared?"

A. I don't. I do not.

Q. And when you spoke with Brian Kitts in the Spring of 2005, were you under any obligation by Winterfox to give him a call that day?

A. No.

Q. Was that something you just did on your own to help out?

A. Yes. I don't know if it helped or not, but it was something that I did on my own.

Q. And with regard to the statement that -- that was read to you from your deposition that Kitts should have been able to qualify for financing, do you know what that was based upon?

A. The information that I had in evaluating what the exit strategy was was that Michael Falk had brokered this loan to multiple conventional lending sources and had had Brian pre-approved with multiple lenders, and it was a question of timing. I recall having a conversation about the pre-approvals, I believe with Aaron Olivarez, that they were good pre-approvals, and those, again, came from Michael Falk and his work as a loan officer for Brian Kitts which I understood Brian Kitts had Michael Falk do multiple loans for him over the years. So they -- Michael knew Brian Kitts' credit and ability to qualify for a loan well, and we trusted that.

The documentation that I was told had been reviewed had every indication that Brian Kitts would qualify for conventional financing to be able to pay this off.

Q. And, I'm sorry, that was the documentation that you yourself reviewed or that you -- or was it documentation you were told about?

A. I believe that I had reviewed the documentation myself.

Q. Was that in the Spring of 2005?

A. I don't believe it was in the Spring of '05 because the loan was done -- both of the loans were done very quickly. I don't think that we had a lot of time in order to make the decision.

The loans were actually closed towards the end of the year, so it would have been within -- within a couple of weeks of the loans actually closing and funding that we would have -- that we would have considered the -- the -- the -- the worthiness of the -- of the ability for Brian to pay it back. I think Spring would have been early. I do believe at the time I -- I -- and -- well, I won't speculate.

Q. And were these pre-approvals from conventional lenders?

A. Yes.

Q. Okay. And did the conventional lenders require that the property be out of foreclosure before they would lend to Mr. Kitts? Do you recall or do you know?

A. I don't recall.

Q. But by late March or April or sometime -- when, in the Spring, did you speak with Mr. Kitts?

A. When did I speak with Mr. Kitts?

Q. Yes.

A. It would have been probably Spring of the year after we did the loan, so probably Spring, I believe, of '05.

Q. Okay. And at that point, Mr. Kitts did not have another loan. Is that correct?

A. Correct.

MS. BOULEY: Your Honor, may I have just one moment?

THE COURT: You may.

MS. BOULEY: Okay. No further questions, Your Honor, at this time. Thanks.

MR. AFFLECK: Your Honor, we have subpoenaed a -- we have no further questions of Ms. Fields.

THE COURT: All right, ma'am. You may step down.

MR. AFFLECK: And, for us, she may be excused.

MS. BOULEY: For us as well, Your Honor.

THE COURT: All right. Thank you for your testimony, ma'am.

MR. AFFLECK: The Trustee has subpoenaed a representative of Deer Creek Title for the purpose of laying foundation for a document that we wish to have received by the Court in this case. I understand that they've had some problems getting down here.

The Trustee is, at this juncture, prepared to rest subject to the opportunity to call the Deer Creek Title witness for the purpose of laying foundation for that document, and I would ask the Court to simply, instead of postponing the trial, allowing the Trustee to call that witness when she arrives in court.

THE COURT: Do you have any idea when that will occur?

MR. AFFLECK: I had assumed that she would be here this morning.

THE COURT: All right. So --

MR. AFFLECK: Just a moment, Your Honor. Mr. Millar informs me that he's had a conversation with her that she is going to try to be here at 1:00, and that she is also under subpoena by Winterfox.

THE COURT: All right. You're ready to rest at this point, but for that witness?

MR. AFFLECK: Yes, Your Honor.

THE COURT: All right. We'll call that witness, then, when the weather permits her to be here.

MS. BOULEY: Your Honor, can we just ask what document it is that they need to have authenticated.

MR. AFFLECK: The document is Exhibit 59B. This is a -- a copy of 59A that Mr. Kent Plott testified to and was received by the Court. 59B includes notes of Deer Creek Title relating to interest between the time of the payoff and the actual payoff that was incurred, and that's the purpose that we want that witness and that exhibit.

In addition, Your Honor, we would like to ask Deer Creek two other questions. Whether they prepared the trust deed notes between the lender and the borrower and where they got the information to prepare the title insurance policy.

MS. BOULEY: Okay. Thank you.

THE COURT: All right. Do you have witnesses that you wish to present?

MR. JUBBER: Your Honor, we have a motion under Rule 52C we would wish to --

THE COURT: All right.

MR. JUBBER: And now that the Plaintiff has been fully heard subject to this limitation, Winterfox would move for a Judgment On Partial Findings pursuant to Rule 52C made applicable pursuant to Rule 7052.

Winterfox submits that the Plaintiff has failed to meet his burden on several issues. First, the Trustee has failed to show that this was a loan primarily for personal, family, and household purposes. Rather, the purpose of the loan, we'd submit, Your Honor, was to save a Sun Peak asset, a corporate asset, from foreclosure.

The evidence that the loan was intended to save a Sun Peak asset from foreclosure is very clear. It also is very clear that Sun Peak owned the property at the time and owned it for at least 14 months prior to this loan. It listed the property as its principal asset on Sun Peak's bankruptcy schedules when it filed its Chapter 11 petition in October -- on October 1st, 2003.

The schedule signed under oath by Mr. Kitts stated that Sun Peak owned the property in fee simple. The property was listed on all Sun Peak's monthly financial reports filed in the Chapter 11 case, reports prepared by Mr. Kitts. The narratives for several of those reports, Exhibits 578, 579 and 580, speak of Sun Peak obtaining a mortgage secured by the property.

After the Sun Peak bankruptcy case was dismissed, Sun Peak used the property as collateral to get a loan in its own name from the Utah Mortgage Center. Mr. Kitts held out the property as a Sun Peak asset. For him to claim and for the Trustee, claiming through him, that Sun Peak never owned the property, as he did on the stand, is simply not true. Thus, when Washington Mutual and Wells Fargo began foreclosure proceedings in the Fall of 2004, it was a Sun Peak asset that was threatened. The purpose of the loan was to save a Sun Peak asset.

The fact that it was a corporate asset is further evidenced by the fact that after the Winterfox trust deed was recorded, the property was immediately transferred back to Sun Peak and record title remained with Sun Peak until June of 2005, after the petition date in this case. The Trustee and Mr. Kitts are attempting to have the Court believe that Sun Peak essentially never existed, to ignore the corporate form and collapse Sun Peak into Mr. Kitts. But, as I noted, the Trustee stands in the shoes of Mr. Kitts, and Mr. Kitts can't hold out the property as a corporate asset and also claim it as personal. He can't have it both ways.

Second, Your Honor, we'd submit the Trustee has failed to prove that the loan proceeds were used primarily to pay consumer-related debt. The uncontroverted facts in Pre-Trial Order No. 16 states that the only -- the only allocations that are in dispute in this lawsuit are with respect to No. 1, the Ed Ingram judgment, the Washington Mutual obligation, and the Wells Fargo obligation. As to the Ed Ingram judgment, it is clear on the face of the judgment itself, Exhibit 509, that this was a corporate debt of Sun Peak's. The judgment ran against Sun Peak. Sun Peak is expressly named as a Judgment Debtor. The work done by Mr. Ingram was done when Sun Peak owned the property. Thus, the payment of this judgment from the Winterfox proceeds was a payment of a business debt.

On page 25 and 26 of the trial -- of the Trustee's trial brief, the Trustee uses a chart of personal versus business-related disbursements of the Winterfox proceeds and he puts the payment of this -- of the Ed Ingram judgment, approximately $113,000, in the personal column. Just moving that one entry from personal to business changes the percentage so that the disbursements for business are then approximately 54 percent for business and about 46 percent for the personal. That is just moving the one entry.

However, there's several others.

As to Washington Mutual and Wells Fargo, Your Honor, I have prepared demonstrative exhibits, if I may approach.

THE COURT: You may.

MR. JUBBER: Solely for argument, Your Honor, but we would -- in reviewing these exhibits, first for the Washington Mutual disbursements, the first -- the first page or the first one of these three, and, secondly, for the Wells Fargo and, finally, a summary that relates to the allocations similar to what the Trustee did.

Turning first to the Washington Mutual disbursements exhibit, Your Honor, this is taken from Exhibit 19 and 72A. The property taxes -- well, first of all, the first two entries under the subheading paragraph 1, Escrow Specialists, for the amount of $116,500 and 117,500, those are not disputed as being business related.

The third, property taxes for 2001, 9,566.30, now those were incurred when property was owned by Sun Peak and, as such, we would submit, Your Honor, are -- is a business-related expenditure. Also, the Station Loop property. The Station Loop Road property, 277,000. That was purchased with money taken out of the subject property when Sun Peak owned it. It was -- was the investment property for the Kitts. The testimony of the court is heard with regard to the claim that was -- that was the Kitts made with respect to that property evidences fact that it was an investment property.

Finally, the improvements. And this is from Exhibit 72A. Those where there's no entry with respect to the description we put over on the side B or U, either business or unidentified. Those others are business-related. Again, expenditures and improvements that were done on the property when Sun Peak owned it. They total -- the total of those, conceded and not conceded, are approximately $45,000. If you add up the two sections, Your Honor, it comes to $565,000. Using those figures, the amount of the Washington Mutual disbursements totals approximately 95 percent versus 5 percent that were personal.

Turning to the Wells Fargo disbursement analysis, those that are unidentified are business related, $41,000. Again, these are -- these are conceded by the Trustee. The Court might recall that Mr. Affleck conceded conceptually that mortgage payments that were made on Washington Mutual from the Wells Fargo money should be prorated. Prorated according to the 95 percent, Your Honor, it comes to $11,200 of those expenditures should be prorated as business. Also, Your Honor, in paragraph 3, which is significant, these are $65,000 from the Wells Fargo that went into the Sun Peak account. $65,000 is clearly business related.

Disbursements from the Zions Bank that are business related, again, conceded by the Trustee, one of them being, again, a mortgage payment that should be prorated according to the same percentages.

Finally, from Exhibit 77, again, conceded by the Trustee, a total of $45,000. Adding all those up, you get $170,000. Using that number in the -- in the chart comes out with a percentage of 55.9 related to business, 44.1 related to personal. Using those figures from Washington Mutual, from the Wells Fargo and, also, from the Ed Ingram judgment, the final exhibit, Your Honor, is a disbursement summary of the Winterfox loan that works out 86 percent for business-related and only 14 percent for personal. The Trustee has failed to meet his burden of proof, and this is taken from -- from their exhibits.

Third, Your Honor, the Trustee has failed to prove that the loan was originated by Winterfox. There's no evidence to support that finding. The only evidence is to the contrary. The loan was not originated by Winterfox. Rather, the evidence from both Mr. Bybee, Mr. Olivarez, Ms. Fields said Winterfox was approached by Michael Falk on behalf of Mr. Kitts. Winterfox was not out originating or seeking to make the loan. The word originate in the statute means something more than simply making a loan. We submit that TILA is intended to regulate lenders who are out initiating loans, soliciting borrowers. Winterfox did none of that.

Fourth, Your Honor, the statute also requires that the loan be originated through a mortgage broker. Mr. Falk has been conspicuously absent in these proceedings. The Trustee has the burden and has not produced Mr. Falk to state that he was a mortgage broker or to explain what he did. The only evidence on that point is that he was not a mortgage broker at the time because he was not licensed from May 2004 to December 2004. Mr. Olivarez testified that he was a loan consultant for Winterfox, not a broker, and the Trustee has failed to prove his -- satisfy his burden of proof with respect to this element as well.

Based upon that failure, Your Honor, we would submit that he has failed to satisfy his burden of proof on key elements of his claim, and we would -- on that basis, a judgment on partial findings, we'd submit, is appropriate dismissing this claim with prejudice. Further, we would submit, Your Honor, that under Rule 52C, that if the Court finds that TILA does apply, that the Trustee has failed to prove damages under both 1640 -- 1640(a)(1) and 1640(a)(4).

First, as to actual damages. The Trustee has not shown that Mr. Kitts detrimentally relied. The evidence, again, is to the contrary. Mr. Kitts testified that he never read the Winterfox loan documents. Furthermore, the Trustee has not shown that there was any other loan available. The idea that he might have been able to obtain another loan is pure speculation. The Trustee has not produced any evidence of any alternative loan. In fact, the Trustee testified that -- excuse me. Mr. Kitts testified that he was in a panic because there were no other loans available. There were no actual damages.

Finally, Your Honor, as to finance charges and fees, the only evidence is that Mr. Kitts testified that he did not come out-of-pocket for anything at the closing, and the unconverted facts state that he has not paid anything since. Section 1640(a)(4) requires that the amounts be paid by the consumer. The Trustee has failed to show that Mr. Kitts paid anything and, accordingly, there are no damages under 1640(a)(4) either.

We would ask for judgment on partial findings on those six points, Your Honor. Thank you.

THE COURT: Mr. Affleck.

MR. AFFLECK: TILA applies to a loan that is primarily for consumer purposes which is family, personal or household purposes. The Trustee has presented sufficient evidence to show that this loan was primarily for personal, family or household purposes. There are several important facts that have been shown.

Number one, the loan was to an individual. Number two, the loan was secured by residential property. Number three, the residential property was the borrower's principal dwelling. Number four, the trust deed prepared by the lender, or at the lender's direction, was in the name of the individual borrower indicating the borrower's legal and equitable ownership of the property at the time the loans were made. Five, there were three liens in the process of foreclosure. Six, the borrower -- the borrower was in a panic to refinance and prevent the loss of his family home. Seven, the foreclosing liens were all obtained by the borrower or his spouse individually for primarily personal, household or family purposes.

Those are set forth in the summaries that have been received by this Court of the proceeds of the Washington Mutual loan, the Wells Fargo loan, and the Ed Ingram mechanic's lien which was a mechanic's lien that was put on the home based on an oral contract between Ed Ingram and Brian Kitts to make an addition of a garage to their home.

Eight, notwithstanding Winterfox's calculation of the amounts, more than 55 percent of the proceeds of the loan was actually used for personal, family or household purposes. Of these facts, Your Honor, the most important fact is the borrower's motivation for getting this loan. In Anderson vs. Lumber -- or Anderson vs. Lester, which is a 1980 case out of Louisiana interpreting the TILA provisions, the question in that case was whether the borrower got a business loan or a consumer loan. The Debtor was a sole proprietor, he had a trucking business and it had a lot of debts, and one of those debts had been reduced to a judgment, and the judgment creditor took a Judgment Debtor's Examination of the Debtor and said we're going to take your house. We're going to seize your home.

The Debtor was in a panic that he might lose his home, so he went out and he got a loan to pay off business debts, debts that had been incurred through his business, through his trucking business, so that those business debts would not threaten his home. Even though the Debtor paid business debts with that loan, the Court found that the purpose was to save the home from foreclosure which was a personal, family or household purpose.

Anderson vs. Lester is also reflected in the case of Dawson vs. Thomas. That's a 2008 case decided by a bankruptcy court in the -- in Washington, DC. The facts are the same. The Debtor was about to lose her home through a foreclosure. She got a loan to save the house from foreclosure, from being lost. The Court did not discuss the underlying character of the debt that was paid off. Instead, the Court found that to save one's home from a foreclosure -- to get a loan to refinance to save a home from being foreclosed and lost is a personal, family, household purpose. The Court didn't even discuss what the nature of the loans, the underlying foreclosing loans were.

In addition, Your Honor, in that case the Debtor had filled out a statement at closing indicating that the loan was for a business purpose. Business and investment purpose. Notwithstanding that fact, the Court said this was a consumer purpose to save the home from foreclosure. She was living there, the loan was to her, and it was to save a place to live.

Where the motivation of a Debtor or a borrower under a refinance transaction is to save a home from foreclosure, from being lost, no Court interpreting TILA has held that the purpose was anything other than a consumer purpose. On that fact alone, and on that law alone, this Court may determine that this loan that Mr. Kitts was getting in a panic to save a place for he and his family to live was a consumer loan.

Now, of secondary importance, Your Honor, is the use of the money. Sometimes a refinance -- sometimes a borrower will get a refinance not for the purpose of saving a home from foreclosure, but just to get a better interest rate or to get some extra cash. That happens. In such circumstances where motivation -- where the motivation of the Debtor is not made obvious by the circumstances, Courts look at the uses of the money. And when the money is used to pay existing liens, it is the original character of these liens that governs. Now, here, Your Honor, the evidence, the Trustee would submit, shows at least a 55-45 allocation of those uses. 55 percent for consumer purposes, 45 percent for business purposes or purposes that we could not discover from the facts.

Now, Winterfox argues that title is very important in this case; that since the title was in Winterfox's name, and it was. It's undisputed. But before the loan was made and after the loan was made, title was in Sun Peak. But title to the property does not make the purpose -- who holds title does not make the purpose of the loan consumer or business. It's not relevant. Or, at least, it's not very relevant.

If Winterfox believed that the loan was to Sun Peak and that Sun Peak owned the home, which is what it has argued in its trial brief, and I think in this Rule 52 Motion today, it would have prepared different documents. It had a title report that showed that the property was in -- the legal title to the property was in Sun Peak's name. Why was the loan agreement drawn up in the Debtor's name by Winterfox? Why were the trust deed notes in Brian Kitts' name individually? Why were the trust deeds in Brian Kitts' name individually? It's because Winterfox understood that Brian Kitts was the true owner of this property notwithstanding who was on legal title.

Also, title is not controlling under TILA. Title is very important in bankruptcy cases. We get used to it. There are certain powers that a Trustee has of a hypothetical bonafide purchaser, so title for bankruptcy attorneys, for bankruptcy judges is very important to determine rights under bankruptcy laws. But this isn't a bankruptcy law question. It is a Truth In Lending Act question. And under the Truth In Lending Act, what is important is the purpose.

The purpose of the loan is not defined by who has title. If there is an office building that is used as an office building and it is in the name of a consumer, borrower, and the borrower borrows on that, the fact that the office building is titled in the Debtor's name or, yeah, the fact that the office building is titled in the Debtor's name does not mean that the office building is his personal residence. And it doesn't make the purpose of the loan a consumer loan.

If you turn that around, residential property is not business property merely because it is titled in the name of a business that is owned wholly by the Debtor and his spouse. The thing that defines property as business or consumer property is its use, and the undisputed fact are that this property was used as Brian Kitts' home, the home of his family, where they ate their meals, spent their holidays, did their homework from 1998 to today.

Under section 1602(a) of TILA, this is the definition or the provision that defines a high-cost mortgage loan. One of these loans, a high-cost consumer mortgage loan, is defined as a credit transaction "that is secured by the consumer's principal dwelling." I think it's significant under TILA that it doesn't say secured by property that the consumer has legal title to. It is secured by the consumer's principal dwelling. Dwelling is defined in TILA under section 1602(v) as "a residential structure or a mobile home that contains one to four family housing units."

Nowhere in TILA is legal title made a distinction. If legal title is relevant in this case, it's only relevant to show what the purpose of the loan was or the purpose or use of the home as collateral, and the undisputed facts are this is where they lived. And the loans that were obtained against the property, the loans that were obtained in Brian's individual name and in Brian and Laurie's individual name, and the Ed Ingram lien was obtained by a contract between Brian Kitts and Ed Ingram.

Now, Winterfox, I think, would like to have this Court decide the question based on their collective understanding that the loan was a business purpose loan, that the team, the Winterfox team, of George Bybee and Aaron Olivarez and Marco Fields, since they believed it was a business loan, it must be a business loan. Well, first of all, what their understanding is is not relevant under TILA. It is not a defense to a TILA action. Number two, their testimony is based on hearsay. Number three, it is contradicted by their conduct in this case.

The Winterfox team of Aaron Olivarez, Marco Fields and George Bybee did approximately six loans for Winterfox in 2002. Or between 2003 and 2004. They were all business loans. And in the documents that they produced to the Trustee in this case, there wasn't a single instance where a TILA disclosure was given. The only TILA disclosure that was given on any loan that Winterfox made was this one to Brian Kitts.

In the 10th Circuit case of Gallegos, the 10th Circuit said that when a creditor gives a TILA disclosure, it is an indication, it is evidence that the loan was a consumer loan. Certainly that's not conclusive evidence, but it is evidence. And in this case Winterfox gave that. But there's more to it than that, Your Honor. Here the manner in which the disclosures and notices were given in this case is doubly persuasive as to the consumer nature of this loan.

TILA disclosures and notices are required to be given before -- shortly before and shortly after a loan is made. The evidence in this case, Trustee submits, is absolutely clear that the TILA disclosures that were given in this case were not made or mailed to Brian Kitts on December 4th, or December 5th, 2004, or December 29th, 2004. The disclosures and notices were made up. They were made up after a demand by Mr. Kitts' counsel to see them. Where are they. Show them to us. We'll get them for you. The Trustee submits that the evidence strongly suggests that that is the time that these TILA disclosures were created. It is proved, to the extent it can be proved, by witnesses who will not tell the truth by the Kalix deposition.

In the Kalix deposition, Kalix testified that the forms that were used by Winterfox, and supposedly sent to the Debtor in December 2004, didn't even exist until June 2005. The Court saw those documents today when we looked at -- when Marco Fields was on the witness stand, who testified to you that she mailed the documents in 12 -- in December '04. Right there on the document, right in front of her face was the 06/05 form date that Kalix had prepared.

Each member of the Winterfox team has moreover perjured themselves in this case with respect to this important fact. Evan Bybee signed responses to interrogatories that are Exhibit 10 under oath that the disclosures identified as Exhibit 7 and 8 were sent in December 2004. That is false. Marco Fields testified that she created and mailed them, mailed those forms in December 2004. That is false. Aaron Olivarez testified that Marco Fields called him when she sent them in December 2004. That is false, because they had never been sent.

Why would the Winterfox team falsify evidence and perjure themselves on this issue? The only conclusion is that they knew it was a consumer purpose loan. They had a loan application filled out by Brian Kitts that would have indicated the purpose of the loan. Mr. Olivarez testified that he reviewed that and had it and it was part of the Winterfox loan documents that have not been produced in this case. For the reason that Winterfox committed fraud on this Court, it is sufficient justification, the Trustee submits, by itself to reject Winterfox's argument that the loans were business purpose loans. Their fraudulent acts speak much louder than their self-serving testimony and their arguments, legal arguments to the Court.

Now, Winterfox also claims that it's not a creditor in this case. To be covered by TILA, you must be a creditor. Usually a creditor is someone who makes a lot of consumer loans. Winterfox doesn't. In fact, I think the evidence has come on that it has only made one or two, if the loans in this transaction are treated as two loans instead of one. But when a lender makes a high-cost mortgage loan and the lender uses a mortgage broker, it is covered by TILA.

Did Winterfox use a mortgage broker? I think the best argument for that is Aaron Olivarez's own testimony where we went over the trial brief that was filed by Winterfox and we looked at each fact in the I think it was called the Hodges case. Did you introduce the borrower and the lender? Yes. Although, Mr. Olivarez would say he didn't introduce them because he was Winterfox or he was working for Winterfox. Did he prepare the loan documents? Well, he testified that he did in his deposition. He recanted on that in -- in court, but he finally admitted that at least he prepared all of the information from which that documentation was prepared.

Did he check on the value of the property for the borrower? Yes. He did a site inspection visit. Did he assist in getting title insurance for the lender? Yes. He attended the closing, he negotiated the terms of the loans. Those were all facts that were used in the Hodges case and that were relied on by the Court in the Hodges case to determine that the loan was originated by a mortgage broker.

Was the loan a high-cost mortgage? High-cost mortgage is defined under section 1602(a)(a). It is a loan secured by the consumer's dwelling that is more than 10 percent above the yield on treasury securities with comparable maturity dates within a month before the -- or the month before the loan application is received. We have put in evidence that the term of this loan was 75 days.

The exhibits that we have provided to the Court indicate that the treasury yield on securities for that period of time, 60 to 90 days, is less than 2 percent. What that means is that this loan qualifies -- both loans qualify as high-cost mortgage loans, even if the APR in the loans were only 12 percent. But the APR is not 12 percent for the first loan. It is in excess of 70 percent. The second loan, I believe Mr. Haertel's testimony was that it was 47 percent.

Since TILA applies and the disclosures -- since TILA does apply, the disclosures and notices were required. They were never mailed. The APR which was required to be disclosed but were prepared in the false documents, but they were wrong. The three-day right of rescission was not included in the documents that they prepared. The notices required under 1639 for high-cost mortgage loans totally absent.

Damages under TILA are designed to be punitive to ensure that borrowers have the ability to bring these actions when there is a violation. There are four categories. Actual, statutory, attorney's fees, and finance charges. The statutory damages is $4,000 per loan. The Trustee doesn't need to prove any facts relating to those damages except that there were two loans. And this Court may determine that it was one loan, it may determine that it was two loans. To us it looks like two loans.

Actual damages are the difference between the loan that the Debtor got and the loan that the Debtor could have got if he had been given the disclosures, if he had been able to compare the APR of the loan that he got with APRs of other loans. Winterfox claims that the Debtor could not have relied on anything because he didn't read the loan documents. Well, the loan documents are not the TILA disclosures. The loan documents don't tell a Debtor -- a borrow what the APR is. They don't provide the Debtor with notice of the right of rescission. They don't provide the borrower with the 1639 -- Section 1639 extra notices that are given for high-cost mortgages.

Mr. Kitts testified that had he understood that the APR under these loans was 72 and 47 percent, he would have looked elsewhere. The testimony of Mr. Haertel in this case establishes that Mr. Kitts could have shopped this loan successfully and obtained another hard-money loan and, perhaps, even a sub-prime loan.

Testimony of Aaron Olivarez and Marco Fields which you heard today emphasizes that Mr. Kitts was someone who could qualify for a sub-prime loan. Why didn't he get one? Because after he defaulted under the Kitts -- under the Winterfox loan, they threatened to record an illegal deed in foreclosure, and so he filed bankruptcy to stop it.

The actual damages in this case, Your Honor, if it's a hard-money loan that the Court determines would have been available to the Debtor, is the difference between a 3 percent origination fee and a, I think, 9 percent or 7 percent origination fee that was in the documents. Sub-prime loan, the interest rate would have been between 8 and 10 percent with origination fees between 1 and 2 percent. I think that is evidence of actual damages in the case.

As to finance charges, Winterfox argues that there is no evidence of damages for finance charges paid because Mr. Kitts didn't pay any finance charges. Well, the settlement statements paint a different picture. Mr. Kitts paid $87,500 in finance charges which are defined as or to include origination fees and broker fees. And the fact that he did not pay those out-of-pocket is really -- I don't understand that fact because -- or that argument because Mr. Kitts got the loan and then he paid the loan with -- he paid the origination fees with the proceeds of the loan that he got.

I don't think the Trustee argued about attorneys' fees -- or I don't think Mr. Jubber argued about attorneys' fees, so I won't address that issue. But based on -- on those facts, Your Honor, I believe that the Trustee has met his burden to overcome a motion for judgment on partial findings at this juncture of the trial.

THE COURT: All Right. Thank you, Counsel. I'm going to take the motion under advisement. We'll reconvene at 1:30. We'll be in recess.

(Recess taken from 12:11 p.m. to 1:35 p.m.)

THE COURT: Are you ready to proceed? I'm sorry. I guess we don't know where we are. Mr. Affleck, is your witness here now?

MR. AFFLECK: Yes, Your Honor. I think we were interested in the Court's ruling on the Rule 52 Motion.

THE COURT: I took it under advisement. We're going forward with the --

MR. AFFLECK: Very well. I thought --

THE COURT: -- evidence.

MR. AFFLECK: I thought perhaps you were just taking it advisement over lunch.

THE COURT: No.

MR. AFFLECK: Thank you. May we check and see if Michelle Huggins is outside?

THE COURT: All right.

MR. AFFLECK: Also, Your Honor, Barbara Smith asked me to ask the Court's permission to have her released from this trial. I understand that she's under subpoena, or was under subpoena from Winterfox, and just wants to make sure that the Court is aware and releases her from that subpoena.

MS. BOULEY: Yes. That's fine, Your Honor. We had

notified her earlier today --
THE COURT: All right.
MS. BOULEY: -- that we wouldn't be calling here.
THE COURT: All right. If the parties are not going to use her, then she may be excused.
MR. MILLAR: The Trustee calls Michelle Huggins.
THE COURT: Ma'am, would you come forward and be sworn, please.
(The witness is sworn.)
THE CLERK: Please take the witness stand, and state your name and spell it.
THE WITNESS: Michelle Huggins. M-i-c-h-e-l-l-e, H-u-g-g-i-n-s.

DIRECT EXAMINATION +

BY MR. MILLAR:

Q. Good morning, Ms. Huggins. Or good afternoon.
A. Afternoon.
Q. I'd like you to turn to what has been marked Exhibit 59A, and the binder's there to your left.
Your Honor, may I approach the witness?
THE COURT: You may.
Q. (BY MR. MILLAR) Ms. Huggins, this is an exhibit that has been previously admitted into this -- into evidence in this case --
A. Yes.

Q. -- and Mr. Plott, a representative of Wells Fargo, has previously testified that he, as the custodian of records of this document, sent this to Deer Creek Title in connection with the Brian Kitts loan, and, as you see there on the second page, it represents a payoff quote. It says the total payoff amount there, about the middle of the page $330,421.45. Do you see where it says that?

A. Yes.

Q. I'd like you to keep your hand on that page, Ms. Huggins, and turn back to what is labeled or tabbed Exhibit 58. Just the prior exhibit. And on the second page of Exhibit 58 you can see, though it is fairly difficult, this document has also been admitted into evidence and represents a disbursement register produced by Deer Creek Title in connection with this --

A. Okay.

Q. -- these Brian Kitts loans. Do you see that?

A. Yes.

Q. Do you see where it says Wells Fargo Bank?

A. Yes, uh-huh.

Q. And can you read the amount there that's listed for --

A. I can.

Q. -- listed for Wells Fargo Bank --

A. Yes.

Q. -- that was disbursed to them.
A. $330,583.34.
Q. And what would explain the difference between the Wells Fargo payoff quote that they sent to Deer Creek Title and what was actually disbursed to Wells Fargo Bank?
A. What could explain that is a difference in day's interest. The day of the settlement when people sign documents is not always the same day that we receive the wired funds from the new lender and are able to pay off the old lender. The funds need to be good and collected and in the bank before we can record documents according to state law. So what usually amounts to the difference in the disbursement check and the payoff is a consequence of a difference in interest.
Q. So any added funds paid to Wells Fargo Bank out of the proceeds of these loans would have been interest?
A. That's correct.
MR. MILLAR: No further questions, Your Honor.
MS. BOULEY: And, Your Honor, as I understand, Ms. Huggins is not feeling well today, and I just have a couple of questions for her, so I wonder if I can go ahead and get my questions done.
THE COURT: You're calling her as your witness --
MS. BOULEY: Yes.
THE COURT: -- is that it? Yes.

MS. BOULEY: Yes. Thank you.

DIRECT EXAMINATION +

BY MS. BOULEY:

Q. Good afternoon, Ms. Huggins.

A. Hello.

Q. Could you please turn to Exhibit 569. It's going to be in another one of the binders.

Your Honor, may I approach to help her with that?

THE COURT: You may.

MS. BOULEY: Thank you.

Q. If you could just take a look at the first three pages of Exhibit 569. They're marked DC 00013, DC 00014, and DC 00015.

A. Okay.

Q. Can you confirm that this is the settlement statement that was signed at the closing on December 8th of 2004?

A. It looks like the settlement statement that -- I'm sure it is. I mean, it's got our marks from the file and everything, so yes.

Q. All right. And then do you know when the funds from this loan were disbursed?

A. I don't without looking. I don't recall without looking back at the disbursement sheet.

Q. I'm sorry. What?

A. I don't know what -- I don't recall. I'd have to look back at the disbursement sheet.

Q. All right. Could you turn to DC 00087.

A. Yes.

Q. And, also, we've got the second settlement statement that's marked DC 00016, DC 00017 and DC 00018 right before that.

A. Uh-huh.

Q. And if you could please take a look at those and then let me know if you can tell us when -- when the loan proceeds were disbursed.

A. I -- it says the settlement date was the 30th and the disbursement date was the 31st; however, it doesn't say that on the first. So whether the funds didn't come in from the lender and what day it actually disbursed, I don't know without looking at the dates that the checks were issued, and I don't know if we sent copies of the -- looks like behind that there are copies of disbursement checks being wired out.

Without having the file in front of me, I can't tell because the disbursement sheet doesn't specify the date on it, and I don't have the file in front of me. So I'm -- I can't tell by the information I have right here for sure what day it was disbursed.

Q. Okay. All right. Thank you. No further

questions.
MR. MILLAR: No further questions, Your Honor.
THE COURT: Ma'am, you may step down.
MR. MILLAR: Your Honor, we don't need Michelle Huggins for anything further. We'd ask that she can be excused.
MS. BOULEY: Yes, Your Honor. That's fine.
THE COURT: All right. Thank you for your testimony, ma'am. You're excused.
THE WITNESS: Thank you.
THE COURT: Do you have any other witnesses in your case in chief?
MR. AFFLECK: No, Your Honor.
THE COURT: All right.
MR. JUBBER: Your Honor, we would call Kevin Bird.
THE COURT: Oh, and we would call him if we knew where he was.
MR. AFFLECK: Your Honor, may I be excused to find him?
THE COURT: Yes.
MR. JUBBER: Your Honor, may we proceed? I call Evan Bybee.
THE COURT: All right. Sir, would you come forward.
MR. MILLAR: Could we ask that we wait for Mr. Affleck to return to the courtroom.
THE COURT: He can come up here and be sworn at least. Sir, we'll swear you in again in the Defendant's case

in chief.

(The witness was sworn.)

THE CLERK: Please take the witness stand, and state your name for the record.

MR. JUBBER: May I proceed, Your Honor?

THE WITNESS: George Evan Bybee.

THE COURT: Mr. Millar, would you see if he's just stepped outside in the hall or where he's gone.

You may proceed.

MR. JUBBER: Thank you, Your Honor.

DIRECT EXAMINATION +

BY MR. JUBBER:

Q. Mr. Bybee, you have been in attendance since the beginning of these trial proceedings that were commenced last Tuesday, December 1st. Isn't that true?

A. That's correct.

Q. You were here when Mr. Brian Kitts testified?

A. That's correct.

Q. Did you listen into his entire testimony?

A. Yes.

Q. Do you recall, toward the conclusion of his examination by Mr. Affleck, he was asked if he had ever met you prior to the commencement of this trial. Do you recall that?

A. Yes.

Q. And he responded that you had met once before at the property. Do you recall that?
A. Correct.
Q. Do you recall that meeting?
A. Correct.
Q. Did it take place?
A. It did.
Q. Were you there?
A. I was.
Q. Do you recall approximately when that meeting would have taken place?
A. It had to be in the Christmas time frame of '07.
Q. Okay. Do you recall Mr. Kitts stating that at that meeting you -- you introduced yourself as one Alan Ross?
A. I heard him say that, yes.
Q. Do you recall that, hearing that testimony?
A. Yes.
Q. Did you, in fact, introduce yourself as Alan Ross at that meeting?
A. No, I did not.
Q. How did you introduce yourself?
A. As George Bybee.
Q. Have you ever used the name Alan Ross as a fictitious name?

A. Never heard of it before.
Q. Sorry?
A. Never heard of it before.
Q. You've never used the name as a fictitious name or alias.
A. No, sir.
Q. Have you at any time ever used any fictitious name or alias?
A. No, sir.
Q. What was your intention in going to the property that day?
A. My friend, Mr. Romero, was up for the Christmas ski season and he was looking to buy some property, and I had taken him to some properties that a cousin of mine had built. He looked at that, said he wanted to look at some other properties, and I mentioned the property that Winterfox had an interest in, and he wanted to see that. So I took him up by the house.

The house is set down away from the road, and so to see it, I pulled down the driveway to the edge of the parking area. At that time someone walked out. I had never met Mr. Kitts before either, and so when we stepped out of our car, he came over and introduced himself as Brian Kitts. I introduced myself as George Bybee, and I introduced to him Ricardo Romero. In Mr. --

Q. Did you go to the property with the intention of meeting Mr. Kitts that day?
A. No, I did not.
Q. Did you introduce your friend to Mr. Kitts?
A. I did.
Q. Did Mr. Kitts say anything to your friend?
A. He did. They hit it off. Apparently Mr. Kitts owns a piece of property --
MR. AFFLECK: Objection. Hearsay and relevance.
MR. JUBBER: May I rephrase the question, Your Honor?
THE COURT: You may.
Q. (BY MR. JUBBER) Was there a conversation that ensued?
A. There was.
Q. Can you tell us what the substance of that conversation was.
MR. AFFLECK: Objection. Calls for hearsay and relevance.
THE COURT: What is the relevance, Counsel?
MR. JUBBER: Your Honor, the -- there was a conversation that ensued, and we believe that if permitted we could show that it relates to the credibility of Mr. Kitts.
THE COURT: All right. Then it's a statement Mr. Kitts made who was a party, so the objection's overruled.

THE WITNESS: Mr. Kitts and Mr. Romero shared an interest in property in Mexico. Mr. Kitts related that he had a piece of property that he had owned for several years in Banos de Hualtuco which is near Acapulco. Mr. Romero owns property in Acapulco, and Mr. Kitts described to him that he had some various and sundry problems with his property, and since Mr. Romero introduced himself as a licenciado, which is a lawyer, he talked a little bit about that property and the problems he was having with that property.
Q. (BY MR. JUBBER) With Mr. Kitts' property in Mexico?
A. That's correct.
Q. And Mr. Kitts and Mr. Romero did not own property together?
A. No, sir.
Q. They each owned -- each own separate pieces of property --
A. Mr. Romero owns his property in Acapulco, and Mr. Kitts related that he owned his property in Banos de Hualtuco.
Q. Okay. Did Aaron Olivarez have authority to bind Winterfox without your permission?
A. No, sir.
MR. AFFLECK: Objection. Calls for a legal conclusion.

MR. JUBBER: That doesn't -- that doesn't call for a legal conclusion. It calls for Mr. -- Mr. Bybee's understanding of what Mr. Olivarez's authority was.

THE COURT: The objection's overruled.

THE WITNESS: No, he did not.

Q. (BY MR. JUBBER) Now, you were asked about a loan application. Do you recall that?

A. I was.

Q. Okay. Have you ever seen the loan -- a loan application in connection with this matter?

A. No, sir.

Q. If you had a copy of a loan application, would you have produced it?

A. Of course.

Q. Did Tom Adams have some of the loan documents?

MR. AFFLECK: Objection. Foundation.

THE WITNESS: He did.

THE COURT: Sustained.

Q. (BY MR. JUBBER) Do you know who had some of the loan documents after -- after the loan was -- after the loan was made?

A. Mr. Olivarez was to give a copy of the loan documents to Mr. Tom Adams.

Q. Is Mr. Adams now deceased?

A. He is.

MR. JUBBER: Thank you, Your Honor.
THE COURT: Examination for this witness?

CROSS EXAMINATION +

BY MR. AFFLECK:

Q. Mr. Bybee, when you visited Mr. Kitts' home, is it your testimony that you introduced yourself as Evan Bybee?
A. I introduced myself as George Bybee.
Q. As George Bybee. And did you explain to Mr. Kitts your relationship with Winterfox?
A. No, I did not.
Q. Is there a reason for that?
A. It was not asked. And I didn't expect to stay there. We were just parked at the edge of his property.
Q. And you were visiting the property after Mr. Kitts' default on the loan. Right?
A. Yes, sir.
Q. And after he had filed bankruptcy. Right?
A. Yes, sir.
Q. You say that Aaron Olivarez did not have authority to bind Winterfox?
A. No, sir.
Q. Did it have -- did he have authority to create loan documents for Winterfox?
A. He had authority to get the documents prepared for the signing.

Q. Did he have authority to negotiate the loan terms for Winterfox?

A. He had the authority to prepare and negotiate terms for my -- to present to me.

Q. Did he have authority to do a site visit and determine the value of the property for Winterfox?

A. He did. He was to review all of the pertinent issues and bring the options to me.

Q. Did he have authority to obtain or work with a title company to get title insurance for the property?

A. He did. He was to prepare all documents to get -- or prepare all options to present to me.

Q. So the only thing he didn't have authority to do was to sign the bottom -- sign the dotted line, so to speak. Is that right?

A. And disburse funds, correct, uh-huh.

Q. Wasn't it Aaron Olivarez who -- so is it your testimony that Aaron Olivarez did not have authority to give instructions to Deer Creek Title on how to disburse the loan funds to Michael Falk, Heritage Prescott, and Winterfox?

A. I was unaware of the Heritage Prescott disbursement of funds.

Q. So is the money that Winterfox received from the loan proceeds, $62,500, was that an unauthorized distribution?

A. No, sir.
Q. So Winterfox did authorize that?
A. No. What I'm saying is I didn't understand anything about the distribution of the 25,000 to Mr. --
Q. But you didn't -- at some point you found out about the $25,000?
A. I found out about it later.
Q. And you --
A. That's correct.
Q. And as Winterfox's manager, you didn't object to it, did you?
A. We're talking about years later. It was --
Q. So you object to it now?
A. -- water under the bridge.
Q. Are you -- have you objected to it now?
A. I --
Q. Have you asked for return of the --
A. Again, the money was disbursed a long time ago.
Q. Have you asked --
A. Mr. Olivarez owed me other monies, and I simply let it go under the bridge.
Q. I see. No further questions, Your Honor.
MR. JUBBER: Nothing further, Your Honor.
THE COURT: Sir, you may step down.
MR. JUBBER: All right. We would call, again,

Mr. Kevin Bird.

THE COURT: Mr. Bird. Would you come forward. You remain under oath.

DIRECT EXAMINATION +

BY MR. JUBBER:

Q. Mr. Bird, as of April of this year when your deposition was taken, you were still asserting a claim for rescission in this adversary proceeding. Isn't that correct?

A. Yes. I think it was dismissed after that point.

Q. Okay. Do you recall when it was dismissed?

A. No. There was discussion this morning as to whether that was in June of -- of that year, but I don't know for sure.

Q. Okay. I'll represent to you it was on June 25th, 2009. Does that --

A. Okay.

Q. Does that sound correct?

A. I would -- I wouldn't have any reason to dispute.

Q. Okay. And do you -- your deposition was taken back on April 30th. Is that right?

A. I don't recall. I'm sorry.

MR. JUBBER: May I approach the witness, Your Honor?

THE COURT: You may.

Q. (BY MR. JUBBER) Showing you a copy of your